of the vessel does not necessarily know the character of the cargo and therefore should not be compelled to suffer, having done no affirmative wrong. However, since the defense is based in knowledge, proof of it to the owner destroys the immunity and the vessel again becomes subject to seizure.

As said before Article 40 of the London Declaration, *supra,* has been accepted by most states. It represents the transition to the third stage and provides for the confiscation of the vessel, if one-half the goods carried, in value, weight, volume or freight is contraband. Under it the *Hakan, supra,* is decided. The defense raised was that the old American idea of *mala fides* in the owner prevailed, and that Article 40, and its adoption by Orders in Council was *contra* to International Law and invalid, but the court, citing the proposition of the United States, at the London Convention [15] as expressive of the change of sentiment, adopted the rule of Article 40 as controlling and firmly settled it as being the law with its stamp of judicial approval.

P. F. N.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AWARD ON HEARSAY EVIDENCE—Many of the Workmen's Compensation Acts of this country provide that the administrators of the Act, Industrial Commissions, *etc.,* are not to be bound by the formalities of legal procedure in passing on the merits of cases arising under the Act, and some even specifically point out that the Commission or Referee may disregard the common law and statutory rules of evidence and procedure other than those presented in the Workmen's Compensation Act itself. The purpose of such enactments is, of course, that the utmost freedom shall be allowed in the investigation of a claimant's right to compensation, to the end that relief may be granted in worthy cases as speedily as possible. Under such statutory directions the question of the admissibility of hearsay evidence in proceedings under the Compensation Acts is of considerable importance. In a former note [1] it was pointed out that in nearly all jurisdictions the findings of fact of the administrative body, hereafter called the Commission, are final and not subject to review by the courts. It will be seen from that note that in general the Commission must act within its powers in making an award, that it has no right to act on mere supposition, guess work or conjecture, nor can it base an award on legally incompetent evidence; and that it is generally agreed that the mere

[15] The proposals of the United States to the conference are embodied in the Naval Code of 1900 with the Amendment of 1903. They were prepared by Rear-Admiral Stockton, U. S. N., under the guidance of the Secretary of State, and endorsed by the President.

[1] 64 UNIV. OF PENNA. L. REV. 744, May, 1916.

admission of what in a regularly constituted court of law would be incompetent evidence will not of itself invalidate an award. Therefore, in the light of the statute provisions referred to, we have presented in this discussion the question: is pure hearsay legally competent evidence on which facts may be found and an award based?

The Court of Appeals of New York has answered the question in the negative. In *Carroll* v. *Knickerbocker Ice Co.*,[2] that court laid down the rule that while the admission of hearsay evidence was justified by the statute,[3] there must be some evidence of a legally competent nature and of recognizedly probative value on which an award may be based. In this case the workman was employed in delivering ice. The Commission found that on a certain date while he was so engaged, the tongs slipped and a three-hundred-pound cake of ice fell and struck him in the abdomen, causing an epigastric hemorrhage. He was then taken to the hospital where he developed delirium tremens and died a few days after the alleged accident. The Commission's finding was based solely on the testimony of witnesses who related what Carroll had told them as to the cause of his injury. These statements were made under such circumstances that they could not be admitted as *res gestae* in ordinary legal proceedings. On the other hand there was the direct testimony of others that they were present at the time and place when it was alleged that Carroll was injured, and that they saw no accident whatever and saw no cake of ice fall.

The Appellate Division of the Supreme Court upheld the decision of the Commission, but by a divided court.[4] Judge Howard in delivering the opinion of the majority, decided that the Commission was authorized and even bound to ignore all the formulated rules of evidence heretofore established both by common law and by statute, and that the spirit of the Compensation Act authorizes the Commission to make its investigation in any manner it chooses, wholly unfettered by any law previously invented by man, and that it is to be bound neither by custom nor precedent. Judge Woodward in a very able dissenting opinion held that the right to compensation must be predicated on the determination that the worker's earnings were cut off by "disability or death . . . resulting from an accidental personal injury . . . arising out

[2] 218 N. Y. 435; 113 N. E. 507 (1916), reversing 169 App. Div. 450 (1915).

[3] New York Laws 1914, Chap. 41, Sec. 68: *Technical Rules of Evidence or Procedure Not Required.* The Commission or commissioner or deputy commissioner in making an investigation or inquiry, or conducting a hearing, shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry, or conduct such hearing in such manner as to ascertain the substantial rights of the parties.

[4] 169 App. Div. 450 (N. Y. 1915), annotated in 64 UNIV. OF PENNA. L. REV. 325.

of and in the course of the employment" [5] and that before any award can be made *actual proof* that the worker sustained an accident which arose out of his employment must be given and that the accident caused the injury to his person which resulted in disability or death, and that under no circumstances can the testimony adduced to prove the plaintiff's claim be considered actual proof.[6] Section 68, therefore, cannot be construed to warrant the Commission to make a finding and award without legal evidence to sustain it, although the Commission has the right to admit proferred proof freely and liberally with a view to developing all the facts, and in fact to take any measures which will help it to clear up the situation and lead it to a knowledge of the actual facts. To this end technical rules of evidence cannot be allowed to hinder an investigation. But no matter how much extraneous matter is thus developed there must remain a residuum of legal proof upon which an award may be based.

It will be seen that the fundamental difference between the views above stated is this; the majority acts on the theory that the Commission in its administration of the law needs merely to be convinced through its investigation of the justice of the claim, and may arrive at its conviction through any fair means, excluding supposition or conjecture, and if it believes hearsay testimony credible it may act upon it; on the other hand the minority hold that the change in the law affects merely the procedural limitations on a legal inquiry, and actual proof, *i. e.*, some evidence of a recognizedly probative value is essential to a just conclusion.

The same distinction is preserved in the Court of Appeal, which by a divided court reversed the Appellate Division. Justice Cuddeback, speaking for the majority, delivered an opinion approving the dissenting opinion of Judge Woodward, pointing out that the only substantial evidence before the Commission was to the effect that there had been no such accident as alleged. Chief Justice Willard Bartlett concurred in the result, but indicated a broader attitude towards the effect of hearsay under the Act.[7] In a dis-

[5] New York Laws 1914, Chap. 41, Sec. 10.

[6] "The change in the fundamental spirit and purpose of our statutes governing indemnity for industrial accidents has in no wise waived or lessened the necessity for actual proof of the accident, its relation to the employment, the resultant injury, and the consequences of that injury." Woodward, J., in 169 App. Div. 450, p. 455.

[7] "I think that the Workmen's Compensation Law permits the Commission to base an award upon hearsay evidence, in the absence of substantial evidence to the contrary; but where, as in the present case, the hearsay evidence is directly contradicted by the testimony of eye-witnesses to the event, it does not suffice to raise any issue of fact. This view accords with the liberal spirit of the enactment without giving to hearsay evidence a sanction which I cannot believe the Legislature intended to give it." Opinion of Willard Bartlett, C. J., 113 N. E. 507, p. 509; 218 N. Y. 435, p. 441.

senting opinion Justice Seabury declares that the Legislature when it enacted the law, did so to further the social interest of the community at large, and that in its interpretation the social point of view should be considered rather than the juristic viewpoint developed through centuries of common-law tradition.[8] Justice Seabury also remarks on the inconsistency of holding, as do the majority, that such evidence may be admitted and yet an award may not be based on it. "If the Legislature sanctioned the admission of this evidence, it follows by necessary implication that it intended to authorize the Commission to act upon it." And again, to sustain an award based on hearsay does not mean that the Commission must act on all hearsay, but only that it may act on it when the circumstances are such that it is deemed by the Commission to be trustworthy.

In the administration of the English Act, the courts have uniformly refused to allow awards based on hearsay, although they generally allow a liberal interpretation of the doctrine of *res gestae*.[9] In an Irish case one of the Justices was of the opinion that an award based on hearsay, particularly on statements made by a deceased workman as to the cause of his injury, could be upheld on the ground that in many instances there is no other possible evidence,[10] but in a later case the same Justice acceded to the general English rule.[11]

[8] "The Workmen's Compensation Law is a new step in the field of social legislation. We should interpret it in accordance with the spirit which called it into existence. . . . This court is under no obligation to see to it that laws enacted to remedy abuses arising from new industrial and social conditions shall be made to square with ancient conceptions of the principles of the common law." Dissenting opinion of Seabury, J.

[9] "In cases of this kind we do give considerable latitude in admitting the statements of deceased persons under the head of what is called *res gestae*. But to admit these statements in evidence (statements by deceased workman to his wife as to cause of his illness) would be to go far beyond what the court has ever sanctioned and contrary to English law." Fletcher Moulton, L. J., in Gibbey v. Great Western Ry. Co., 3 B. W., C. C. 135 Amys v. Barton, 5 B. W. C. C. 117 (1912); and even where the statement was against the interest of the workman, Tucker v. District Council, 5 B. W. C. C. 296 (1912).

[10] Cherry, L. J., in Wright v. Kerrigan, 4 B. W. C. C. 432 (1911).

[11] "I must confess that in Kerrigan's case (*supra*, note 10), my opinion was that there was no evidence whatever as to the cause of the injury or as to its having been incurred in the course of the man's employment, unless the statements of the man himself were admitted in evidence. I was always under the impression that in such cases the best and, in many cases, the only evidence that can be obtained, as to the nature and effects of an injury, is the statement of the injured man himself, and that evidence as to the nature of the injury includes not only the physical fact of the injury, but also the immediate cause. It is an additional part of the statement as to the nature of the injury. However, the English decisions that have been cited to us hold otherwise, and must be followed by us. It will have the effect of shutting out hundreds of cases where

There are few American cases and all of them reach practically the same conclusion. In *Englebretson* v. *Ind. Acc. Comm.*,[12] the court held that the rule against hearsay is not a mere "technical rule of evidence," but is of a substantive nature, and that a statute providing that the Commission "shall not be bound by the technical rules of evidence," does not authorize an award on hearsay evidence.[13] In *Reck* v. *Whittlesberger*,[14] it is stated that the mere admission of hearsay evidence is no ground for reversal as long as there is other evidence of a substantial nature on which an award can be based.

The question has not yet come before the Pennsylvania courts. It remains to be seen whether they will adopt the strict construction given in the *Englebretson Case*, or the happy medium proposed by Chief Justice Willard Bartlett which seems to be the most sensible and really just solution of the difficulty.[15]

T. L. H.

EDITOR'S NOTE—Since the note discussing the *Carroll Case* was written, the case of *Botto* v. *Hamilton* has been decided by the Court of Common Pleas of Philadelphia.[1] In that case a workman suffered an injury to his arm, which resulted in blood poison and his subsequent death. It was alleged that he fell while at work and injured his arm there. The Board found this to be the case, and based its finding and award on the testimony of the mother of the workman as to what he told her four days after the accident as to the cause of his injury, and the testimony of two other employes, who saw him fall in such a way as to make it quite likely that the wound which caused his death was received in the fall. It appears that the purely hearsay evidence of the mother resulted in obtaining the corroborating testimony. The defendant attempted to have the award set aside, on the ground that it was based on hearsay evidence. The Court sustained it, however, on the ground that

no other evidence of the nature of an injury is obtainable. We cannot be responsible for that." Cherry, L. J., in Donaghy v. Ulster Spinning Co., 46 Ir. L. T. 33 (1912).

[12] 151 Pac. 421 (Cal. 1915). *Accord*, Employer's Assur. Corp. v. Ind. Acc. Comm., 151 Pac. 423 (Cal. 1915).

[13] Cal. Laws 1913, Chap. 176, Sec. 17.

[14] 181 Mich. 463 (1914). And see Fitzgerald v. Lozier Co., 154 N. W. 67 (Mich. 1915); Pigeon's Case, 216 Mass. 51 (1913).

[15] Pennsylvania Act of 1915, P. L. 736. Section 409 provides: "The Board's findings of fact shall in all cases be final." Section 428 reads as follows: "Neither the Board nor any Referee shall be bound by the technical rules of evidence in conducting any hearing or investigation."

[1] Botto v. Hamilton, C. P. No. 4, Philadelphia, No. 3555, Sept. Term, 1916. Decided, opinion handed down January 8, 1917. Affirming decision of Workmen's Compensation Board, 2 Pa. Dep. Rep. 2438 (Oct. 28, 1916).